SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, PETITIONER

v.

HOWARD EUGENE ROWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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UNITED STATES OF AMERICA, PETITIONER

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HOWARD EUGENE ROWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit entered on July 23, 1969, in the above case.

OPINION BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 7–9) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1969 (Appendix, *infra*, p. 10). A petition for rehearing was denied on August 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

369-131—69

QUESTIONS PRESENTED

1. Whether persons charged with violating 26 U.S.C. 4742(a) can assert the privilege against self-incrimination as a defense to such a prosecution.

2. Whether this Court's decisions in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, should be given retroactive effect.

STATUTES INVOLVED

26 U.S.C. 4742(a) provides:

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4744(a) provides:

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by

him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

STATEMENT

On September 16 and 17, 1965, respondent was tried before a jury in the United States District Court for the Western District of Missouri and convicted of six counts charging violations of 26 U.S.C. 4742(a) and 26 U.S.C. 4744(a).[1] On September 24, 1965, he was sentenced to imprisonment for ten years. The court of appeals affirmed (368 F. 2d 957 (C.A. 8)), and certiorari was denied by this court (386 U.S. 1009). Respondent's first motion to vacate, pursuant to 28 U.S.C. 2255, on the ground that he was incompetent to stand trial, was denied by the district court. His appeal was denied as frivolous, and certiorari was again denied (390 U.S. 1030).

On January 29, 1968, this Court ruled in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, that since the statutory schemes involved in those cases (taxation of wagers and firearms) required an individual whose activities were regulated by those statutes to file documents with the government containing information which might be incriminating under State or other Federal laws, such an individual could properly assert the privilege against self-incrimination as a complete defense to criminal charges

[1] This was respondent's second trial. His first conviction, in 1964, was reversed by the Eighth Circuit because of an error in the administration of the Jencks Act (18 U.S.C. 3500). See *Banks* v. *United States*, 348 F. 2d 231.

resulting from a failure to comply with those statutes. Thereafter, respondent filed a second motion to vacate, alleging that the rationale of *Marchetti-Grosso-Bidgoo* was equally applicable to the marihuana taxing scheme; that those decisions should be applied retrospectively; and that he had not waived his privilege by failing to raise that defense before this application. The district court again denied relief. While respondent's second was pending in the Eighth Circuit, this Court, on May 19, 1969, decided *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, holding that the timely assertion of the privilege against self-incrimination was a complete defense to a charge of violating 26 U.S.C. 4744 (a). Subsequently, the Eighth Circuit, relying on those decisions, reversed a pre-*Leary* and pre-*Covington* conviction under Section 4744(a) in a case on direct appeal (*Benton* v. *United States*, 412 F. 2d 1005). One week later, that court reversed, again in cases on direct appeal, similar convictions on counts alleging violations of Section 4742(a) and 4741(a), stating that "there is no significant distinction for purposes of the Fifth Amendment privilege" between the two statutes (*Bolton* v. *United States*, 412 F. 2d 1011, 1014).

On the basis of *Leary*, *Covington*, *Benton*, and *Bolton*, the Eighth Circuit in the instant case reversed the district court's overruling of respondent's motion, and remanded to the district court for an order granting his motion to set aside the judgment. In none of its decisions, however, did the court of appeals discuss the criteria relating to the retroactivity of new

holdings of this Court (*e.g.*, *Halliday* v. *United States*, 394 U.S. 831, 832), or the question of timeliness of the assertion of the privilege. Nor did the court of appeals consider any legal distinctions between post-conviction relief in cases on direct review and collateral relief through retroactive application of new decisions to criminal cases where convictions had already become final (see *Kaufman* v. *United States*, 394 U.S. 217, 228–229). On the question of waiver, the court observed that since the government did not challenge respondent's standing to raise the Fifth Amendment privilege, it was entirely appropriate to consider the constitutional question.

REASONS FOR GRANTING THE WRIT AND CONCLUSION

The identical issues raised here are presented to this Court in the government's petition for a writ of certiorari in *United States* v. *Seales* and *United States* v. *Ward*, No. 861, this Term. For the reasons there stated, which we incorporate by reference, the instant petition should also be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

NOVEMBER 1969.

APPENDIX

United States Court of Appeals for the Eighth Circuit

No. 19,388

HOWARD EUGENE ROWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

[July 23, 1969]

Before MATTHES, MEHAFFY and LAY, *Circuit Judges*.

PER CURIAM.

Howard Eugene Rowell's conviction for violations of 26 U.S.C. §§ 4742 (a) and 4744 (a) were affirmed by this court in *Rowell* v. *United States*, 368 F.2d 957 (8th Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).[1]

[1] Section 4742 (a) provides:

"It shall be unlawful for any person . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Rowell filed, under 28 U.S.C. § 2255 in the United States District Court for the Western District of Missouri, a motion to vacate and set aside the judgment of his conviction theretofore entered by that court. The district court overruled the motion from which order Rowell brings this appeal.

The contention is made that the statutes under which Rowell was convicted are unconstitutional, as his compliance therewith would have compelled him to incriminate himself in violation of his Fifth Amendment rights. Subsequent to the hearing in the district court the Supreme Court handed down its decisions in *Leary v. United States*, * * * U.S. * * * (1969), and *United States v. Covington*, * * * U.S. * * * (1969), both decisions dealing with the Marihuana Tax Act, 26 U.S.C. §§ 4741 et seq.

Rowell did not prior to trial or upon appeal to this court from his conviction raise the question of his privilege against self-incrimination, but raised the issue for the first time in his motion to the district court, which is the subject of this appeal. The Government does not challenge Rowell's standing to raise the constitutional issue now. In *Bolton v. United*

Section 4744 (a) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—

"(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

"(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained."

States, * * * F. 2d * * * (8th Cir. No. 18,955 June 27, 1969), this court held that where there is no indication in the record that the defendant waived his right to raise the Fifth Amendment privilege, it is entirely appropriate and "just under the circumstances" to pass upon the constitutional issue. To the same effect, see *United States* v. *Covington*, *supra*, and *Miller* v. *United States*, * * * F. 2d * * * 8th Cir. No. 19,038 June 27, 1969).

There is no indication in this record that Rowell waived his Fifth Amendment rights and it is appropriate therefore that we pass upon the constitutional issue as now raised.

Following *Leary* and *Covington*, this court held in *Becton*, *supra*, and *Miller*, *supra*, handed down simultaneously with *Becton*, that the attempted application of § 4744(a) is unconstitutional as violative of the Fifth Amendment privilege against self-incrimination.

More recently, another panel of this court held in *Buller* v. *United States*, * * * F. 2d * * * (8th Cir. No. 19,246 July 3, 1969), that there is no significant difference between § 4744(a) and § 4742(a), and that the Fifth Amendment, when timely raised, is a complete defense to a charge brought under § 4742(a).

These recent decisions of this court are thus controlling and require that this case be reversed and remanded for entry of an order granting petitioner's motion to set aside the judgment of conviction.

JUDGMENT

United States Court of Appeals for the Eighth Circuit

September Term, 1968

No. 19388

HOWARD EUGENE ROWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Western District of Missouri

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of June 19, 1968 of the said District Court denying motion to vacate judgment and sentence in this cause be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the said District Court for entry of an order granting petitioner's motion to set aside the judgment of conviction.

JULY 23, 1969.